Kwong Yik Bank Bhd v Sa'adiah bte Mastan

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT D1-23-C847-86
SHAIK DAUD J
8 DECEMBER 1992

Civil Procedure *— Judgment — Default judgment — Setting aside — Defence on the merits —Defendant no longer director of company when facilities granted*

The plaintiff obtained judgment in default of appearance against the defendant in respect of facilities granted to a company of which the defendant was a director. The defendant applied to set aside the judgment by contending that: (i) the post-judgment interest at a rate exceeding 8%pa was contrary to O 42 r 12 of the Rules of the High Court 1980; and (ii) the facilities which she had guaranteed had been cancelled and replaced with new facilities, by which time she had already resigned as a director of the company. The plaintiff's application to amend the judgment was allowed and therefore the defendant's first ground was dismissed. However, judgment was set aside on the ground that the defendant had a valid defence. The plaintiff has appealed against the decision to set aside and the defendant has appealed against the decision to allow the judgment to be amended.

Held, dismissing both appeals:

(1) In an application to set aside a default judgment, the applicant need not prove her defence but has merely to show a defence on the merits.

(2) In this case, the defendant had successfully shown a defence as she had ceased to be a director by the date of the second offer of facilities, and as such may well be not liable on the guarantee.

[Bahasa Malaysia summary

Plaintif telah mendapat penghakiman ingkar kehadiran terhadap defendan berkenaan dengan kemudahan yang telah diberikan kepada sebuah syarikat di mana defendan merupakan seorang pengarah. Defendan telah memohon untuk mengetepikan penghakiman itu dengan menegaskan bahawa: (i) faedah selepas penghakiman pada kadar yang melebihi 8% setahun adalah bertentangan dengan A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980; dan (ii) kemudahan yang digerenti oleh beliau telah dibatalkan dan diganti dengan kemudahan yang baru, dan pada masa itu beliau telahpun meletak jawatannya sebagai seorang pengarah syarikat itu. Permohonan plaintif untuk meminda penghakiman itu telah dibenarkan dan oleh itu alasan pertama defendan telah ditolak. Bagaimanapun, penghakiman itu telah diketepikan atas dasar bahawa defendan mempunyai suatu pembelaan yang sah. Plaintif telah membuat rayuan terhadap keputusan untuk mengetepikan penghakiman itu dan defendan telah membuat

A rayuan terhadap keputusan untuk membenarkan penghakiman itu dipinda.

Diputuskan, menolak kedua-dua rayuan itu:

(1) Di dalam suatu permohonan untuk mengetepikan suatu penghakiman ingkar, pemohon itu tidak semestinya membuktikan pembelaannya tetapi hanya perlu menunjukkan suatu pembelaan atas merit.

(2) Di dalam kes ini, defendan telah berjaya menunjukkan suatu pembelaan kerana beliau tidak lagi merupakan seorang pengarah pada tarikh tawaran kemudahan kedua dibuat, dan oleh itu mungkin tidak menanggung sebarang liabiliti untuk gerenti itu.]

[*Editorial Note*: Both the plaintiff and defendant appealed to the Supreme Court. The plaintiff's appeal vide Civil Appeal No 02–286–92 was dismissed with costs and the defendant's appeal vide Civil Appeal No 02–539–92 was allowed with costs on 24 May 1994.]

Notes

For cases on setting aside judgments, see 2 *Mallal's Digest* (4th Ed) paras 799, 1286–1348; [1989] Mallal's Digest 406–414, 418–419; [1990] Mallal's Digest 301–315; [1991] Mallal's Digest 336–337, 339, 344–351; and [1992] Mallal's Digest 276–278.

Wong Hai Wai (*TH Su & Co*) for the plaintiff.
TJ Su (*Cheah Teh & Su*) for the defendant.

Shaik Daud J: This is an appeal by the plaintiff from the decision of the senior assistant registrar whereby she allowed an application by the third defendant to have a judgment entered against her to be set aside, on the ground that she has a valid defence to the plaintiff's claim. On 26 June 1986, the plaintiff had obtained a judgment in default of appearance against the third defendant for the sum of RM205,353.24 with interest at the rate of 14.75%pa with monthly rests from 1 December 1985 until payment; RM237,433.50 with interest at the rate of 15.75%pa on the sum of RM203,872.40 from 1 December 1985 until payment and RM4,805.89 with interest at 14.75%pa on RM4,351 from 1 December 1985 until payment.

At the trial before the learned senior assistant registrar, it was the defendant's contention that the judgment in default of appearance entered as stated above is irregular and defective in that it contravenes the then existing O 42 r 12 of the Rules of the High Court 1980 which only allowed for the plaintiff to claim interest of 8%pa from date of judgment. The plaintiff's reply to this was simple — they had applied for an amendment to the default judgment in order to comply with O 42 r 12 and which application was allowed by the learned senior assistant registrar.

The next issue raised by the third defendant is that the plaintiff's claim is based on facilities granted to the first defendant vide the plaintiff's letter

of offer dated 10 November 1983. She contends that she is a housewife and was appointed a director of the first defendant to give an impression of bumiputra participation which fact is not uncommon nowadays. She contends that the facilities granted to the first defendant, which the third defendant guaranteed in 1983, had been cancelled on or about March 1985 and replaced with new facilities. This apparently is contained in a letter from the plaintiff dated 8 March 1985 which, inter alia, states that the new offer is to supercede and cancel the previous letter of offer dated 10 November 1983. The third defendant contends that by 8 March 1985, she had already resigned as a director of the first defendant effective 25 January 1985.

The plaintiff contends that the third defendant's application should not be litigated as it was thrashed out some four years ago when she unsuccessfully applied to have the judgment set aside before another High Court.

In an application to set aside a default judgment, the applicant need not prove her defence. What she needs to do is merely to show that she has a defence on the merits. While it is contended by the third defendant that her application to have the default judgment set aside some four years ago before another High Court was unsuccessful, it was based on a different reason entirely. Her earlier application was based solely on the issue of non-service while in this application she is challenging the second letter of offer of new facilities to the first defendant and the plaintiff's assertion that the second offer supercedes and cancels the previous facilities.

It is my considered view that the third defendant has successfully shown that she has a defence. Of course, whether she succeeds or not is not the issue at this stage. The plaintiff's contention that the second offer has nothing to do with the third defendant cannot, to my mind, be a valid contention especially when the new offer contained an express condition that 'a joint and several guarantee of the directors be taken'. It is not denied that by the date of the second offer, the third defendant was no longer a director and as such may well be not liable on the guarantee. I agree with the contention of the third defendant that if the second offer was not meant to supercede and cancel the first offer and third defendant was still meant to be liable under the guarantee executed by her on the strength of the first offer, why, therefore, is there the necessity to request for a fresh joint and several guarantee of all directors existing as of the date of the second offer?

The issue before me is whether the third defendant has raised some defence. If the plaintiff contends that she has no defence they can still proceed to strike it out under O 18 r 19 or proceed for summary judgment under O 14. As I said I, am satisfied that third defendant has raised a defence and therefore I dismiss plaintiff's appeal with costs and confirm the decision of the learned senior assistant registrar.

Appeal dismissed.

Reported by Anne Khoo